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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-974

SAMUEL L. POPKIN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Samuel L. Popkin prays that a writ of certiorari issue to review the opinion and judgments of the United States Court of Appeals for the First Circuit entered October 13, 1972, and November 20, 1972, which affirmed a judgment of the United States District Court of the District of Massachusetts finding petitioner in contempt under 28 U.S.C. §1826(a).

Opinion Below

The first opinion of the Court of Appeals, dated May 3, 1972, has been published at 460 F.2d 328, and is printed in

Appendix A hereto. Subsequent opinions and orders of that court were not published, and are printed herein as follows: May 17, 1972 (Appendix B); July 12, 1972 (Appendix C); October 13, 1972 (Appendix D); October 30, 1972 (Appendix E); November 7, 1972 (Appendix F); November 17, 1972 (Appendix H); November 20, 1972 (Appendix I).

Jurisdiction

The judgments of the Court of Appeals were entered on October 13, 1972, and November 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).[1]

Questions Presented

1. Did the witness, a scholar, author and teacher working in a current and controversial field, whose work depends upon access to and protection of confidential sources, have just cause not to answer particular questions asked by a grand jury calling for disclosure of his confidential sources, when his testimony would ultimately restrict the free flow of information to the public, and when the questions had a remote and tenuous relationship to the subject matter being investigated, where there was no showing of any need for the information sought or that there were no available alternative sources?

2. When a witness has been given immunity restricted to a particular subject matter, is he entitled to be informed of the pertinency of a question to that subject matter when pertinency is not apparent on its face, and when the question threatens to intrude upon First Amendment rights?

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[1] That in cases of civil contempt under 28 U.S.C. §1826(a) the petitioner has 90 days within which to file his Petition for Certiorari, 28 U.S.C. §2101(c), was established in *United States* v. *Egan*, 408 U.S. 41.

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Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be . . . deprived of . . . liberty . . . without due process of law. . . ."

Statutory Provisions Involved

The pertinent portions of the following statutes are set forth in Appendix K, pp. 58-68: 18 U.S.C. §§793, 2314, 2315, 2514, 2516, and 28 U.S.C. §1826.

Statement of the Case

1. PROCEEDINGS BELOW. This case arises out of the same grand jury investigation that was involved in *Gravel* v. *United States*, 408 U.S. 606 (1972), and concerned the Pentagon Papers. Petitioner, an Assistant Professor of Political Science at Harvard University and a researcher and writer in the field of the United States involvement in Vietnam, was first called before the grand jury in August of 1971. At that time, he filed a motion to quash the subpoena, which was denied. However, he was not questioned at that time. In October of 1971, petitioner was again called to testify before the grand jury. He filed a motion for a

protective order at that time along with numerous affidavits showing that he was involved in research and writing in sensitive areas concerning United States policy in Vietnam, that his research and writing depended upon confidential sources, and that disclosure of his confidential sources would seriously inhibit his and others' work in this area. The District Court granted him transactional immunity and ordered him to testify, denying his motion for a protective order. Petitioner was called before the grand jury again in January, 1972, and on March 27, 1972. He answered numerous questions but refused to answer others on the ground that they sought confidential sources of information relating to his scholarly research, that they bore a demonstrably remote and tenuous relationship to the subject of the grand jury's investigation, and that the government refused to explain their relevance, if any, thus violating his First Amendment rights. The District Court found him in contempt for refusing to answer nine questions, of which the government pressed seven on appeal to the Court of Appeals for the First Circuit.

On May 3, 1972, the Court of Appeals held that petitioner need only answer three of the seven questions, the majority ruling the other four objectionable because "they are badly phrased". 460 F.2d at 337. The third Judge stated:

> "The generality of the opinion questions here, the apparent basis for the opinion being pursued, and the idea of using one scholar to speculate about the sources of others' work, without any showing of strong need therefor, are repugnant to me." 460 F.2d at 335.

Following the Opinion and Judgment of the Court of Appeals on May 3, 1972, petitioner moved for a stay of the Court's mandate, pending the filing of a petition for writ of certiorari, whereupon, by order dated May 17, 1972, the

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Court of Appeals stayed its mandate "until further order of court—said matter to be considered at the close of the Supreme Court Term in June, 1972". (Appendix B)

Upon reconsideration and after a hearing following the close of the October, 1971, Term of this Court, the Court of Appeals on July 12, 1972, stated its "view that its opinion of May 3, 1972, requires revision in the light of certain recent decisions of the Supreme Court." (Appendix C) It ordered the government, if able, to file a disclaimer of electronic surveillance and further stated:

> "Upon the filing of such disclaimer this Court will reconsider in the light of those cases the merits of appellant's opposition to the orders of the district court holding him in contempt. It will then issue a new order, from which appellant, or the government, may, if desired, seek certiorari.
>
> "No purpose would be served in appellant seeking certiorari at this time. The stay, previously entered, is to remain in force."

On October 13, 1972, the government having filed "a sufficient disclaimer of electronic surveillance," the Court of Appeals ordered the District Court's order of contempt affirmed with respect to the three questions held valid by the Court of Appeals in its opinion and order of May 3, 1972, "unless within 21 days appellants (sic) stipulate in writing to answer them upon demand".[2] (Appendix D)

In the remainder of its order of October 13, 1972, the Court of Appeals vacated without prejudice the order of contempt of the District Court as to the remainder of the questions dealt with in that Court's opinion of May 3, 1972,

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[2] Subsequently, the order was amended to read "37 days." See Appendix F, p. 47, *infra*.

and remanded "the case to the district court for further proceedings, and questioning of appellant, if such be desired."

On October 26, 1972, petitioner filed in this Court an Application for Stay of Mandate. In opposition to that application, the government filed a memorandum stating that there was no factual or legal basis to petitioner's application because

> "the only contested ground of the May 3 decision of the Court of Appeals is its determination that the so-called 'scholars' privilege' urged upon the court has no application where, as here, the witness is questioned not about his sources but merely about conversations with other scholars"[3]

After this Court denied petitioner's Application for Stay, petitioner submitted a Stipulation to the Court of Appeals (Appendix G). Relying upon the government's representations to this Court, the Stipulation stated that since the government represented that the questions referred merely to conversations with other scholars, petitioner would answer the questions. However, the Court of Appeals rejected that Stipulation on November 17, 1972 (Appendix H), thus making clear that its Order of October 13, 1972 (Appendix D) was meant to change its original Opinion of May 3, 1972.[4]

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[3] Memorandum For The United States In Opposition, pp. 3, 4-5, *Popkin* v. *United States*, October Term, 1972, No. A-444.

[4] In its May 3 Opinion, the Court of Appeals stated:

"We therefore conclude that the two questions seeking the names of persons interviewed who gave him knowledge of participants in the Pentagon Papers study should be answered, at least to the extent that the persons were not government officials or other participant sources .... Were it to become clear that a question delved into confidential relationships with such persons, we are not sure the grand jury would see fit to pursue its inquiry. If it did, however, [we] would at least have a factual setting

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Since petitioner did not file a further stipulation, on November 20, 1972, the Court of Appeals affirmed the order of contempt (Appendix I), issued its mandate forthwith, revoked bail, and petitioner was incarcerated on November 21, 1972. On November 28, 1972, the grand jury was discharged at the government's request, and petitioner was released from jail.[5]

2. STATEMENT OF FACTS. All of the facts stated herein are to be found in the record of this case.

The petitioner, Samuel L. Popkin, is an Assistant Professor of Government at Harvard University, a Research Associate at the Center for International Affairs, a member of the editorial board of the journal "Public Policy", and an author of a number of papers and articles on Vietnam and United States policy in Southeast Asia. He has taught and participated in seminars on the same subjects. In the course of his research, he has spent time in Vietnam, and has discussed with numerous people knowledgeable in the field matters concerning United States policy in Vietnam.

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enabling us to address the issue less theoretically." 460 F.2d at 334.

When the Court of Appeals rejected petitioner's Stipulation that he would answer as to all but confidential sensitive sources (Appendix H), it made clear that its October 13 order (Appendix D) modified its May 3 opinion to require that petitioner answer as to *all* sources.

If any doubt remained, it was dispelled at the hearing before the District Court on November 21, 1972 when the government stated that it had no interest in petitioner's conversations with other scholars. The government stated it would call petitioner before the grand jury only if he agreed to answer the questions as to confidential sensitive sources. (Appendix J, pages 52-54, *infra*)

[5] Lest there be any question as to mootness because of the discharge of the grand jury, see *Bursey* v. *United States*, 466 F.2d 1059, 1088-1089 (9th Cir., 1972), petitioner would like to point out two matters:

a) The grand jury in the *Caldwell* case had expired prior to the decision in *Branzburg* v. *United States*, 408 U.S. 665;

b) The government explicitly stated that it was asking for discharge of the grand jury because it did not intend to present further evidence until after the case of *United States* v. *Ellsberg* had been completed, and implied that at that time petitioner might be recalled.

These people included representatives of the United States, both in and outside the Armed Services.

Affidavits were submitted from 24 scholars, some of whom had extensive government experience, such as Professor John K. Galbraith, former Ambassador to India, and Professor Edwin O. Reischauer, former Ambassador to Japan, which established the importance of confidentiality to the kind of research being done by Professor Popkin.

In the course of the proceedings, it became apparent that the grand jury was investigating aspects of the publication of the study now known as the Pentagon Papers. This was told to Popkin at his October 14 appearance before the grand jury, and confirmed by the testimony of the foreman of the grand jury on March 21, 1972.

The authorization of the prosecutors conducting the grand jury proceedings is to investigate violations of 18 U.S.C. §641 (retention of records with intent to convert), 18 U.S.C. §793 (gathering and transmitting of national defense information), 18 U.S.C. §2071 (concealment or removal of public records or documents), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. §371). The District Court found, in its order of October 29, 1971, which Popkin was found by the District Court to have violated, that the grand jury is "engaged in an inquiry into alleged violations of Chapter 37 and Sections 2314 and 2315 of Title 18, United States Code..." The only statute that is common to the authorization and the subject of the inquiry is 18 U.S.C. §793.

At his appearance before the grand jury on March 27, 1972, Popkin testified that he had no knowledge as to whether any person possessed the Pentagon Papers in Massachusetts prior to June 13, 1971 (the date of the first publication), and that he knew nothing about the distribu-

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tion of the papers for publication or any plans to distribute them.

He testified that he did have an *opinion* as to whether anyone possessed the Pentagon Papers in Massachusetts, since,

> "In the course of my research I have become aware that many persons were using portions of studies which probably included this study in preparation of their work, and in addition, many people who have lived in Massachusetts have publicly stated that they worked on or had access to this study; whether or not they had access in Massachusetts, I do not know."

He first heard of the existence of the study now called the Pentagon Papers in late 1967 or early 1968 in an interview which occurred either in Connecticut or Massachusetts, and since then had numerous interviews through which he gained some knowledge of the study, though it was just one of many studies having no particular significance at that time.

All of the information he had concerning the study, on which he based his opinions, came from interviews in the course of his research, other than the information he has acquired from public sources.

The questions at issue, which he refused to answer (and concerning which he requested but was not advised as to their pertinency), fall into three groups: (1) his opinions as to who possessed the papers, (2) his knowledge of who worked on the study, and (3) whether Daniel Ellsberg ever discussed with him the content or existence of the Pentagon Papers between January 1, 1971 and June 13, 1971. The seven questions are:

1. Q. What is the *opinion* as to persons you be-

lieve possessed a copy of the Pentagon Papers prior to June 13, 1971?

2. What is your opinion as to persons you believe possessed a copy of the Pentagon Papers in Massachusetts prior to June 13, 1971?

3. Would you please name them, those persons who furnished you information which caused you to form an opinion as to persons you believe possessed a copy of the Pentagon Papers in Massachusetts prior to June 13, 1971?

4. Who was the conversation with discussing the documents or decisions indicating that person had knowledge or possession of the Pentagon Papers?

A. Persons I interviewed in the course of my scholarly research.

Please name them.

5. Who are the persons you interviewed in order to acquire this *knowledge* of who participated in the Pentagon Papers study?

6. Who are those persons to whom you are referring with regard to conversations in the District of Massachusetts which led you to the *knowledge* of who the participants were in the Pentagon Papers study?

A. Persons I interviewed in the course of my scholarly research.

. . .

Would you please name them?

7. Did Daniel Elsberg ever discuss with you the content or existence of the Pentagon Papers between January 1, 1971 and June 13, 1971?

A. Any information I might have comes from the course of my scholarly research.

[Question repeated]

[yes or no]

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It is now clear that these questions require petitioner to identify confidential sensitive sources, not merely conversations with other scholars.[6] (Appendices D, G, H, I, J)

Reasons for Granting the Writ

I. The Decision Below Conflicts With the Decision of the United States Court of Appeals For the Ninth Circuit.

In *Bursey* v. *United States*, 466 F.2d 1059, *rehearing denied*, 466 F.2d 1090, 1091 (9th Cir. 1972), the Court of Appeals for the Ninth Circuit held that the grand jury was required "to establish that there was a 'substantial connection' between the information sought and the criminal conduct which the Government was investigating before the witnesses could be held in contempt for refusing to answer questions that cut deeply into First Amendment rights." That court held that *Branzburg* v. *Hayes*, 408 U.S. 665, was in no way inconsistent, since it dealt with the question of whether a witness must appear before the grand jury, and it did "not purport to disavow the balancing standards enunciated in such cases as *DeGregory* v. *Attorney General of New Hampshire* (1966) 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed. 2d 929, and *Bates* v. *Little Rock* (1960) 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed. 2d 480." 466 F.2d at 1091.

The First Circuit, however, rejected that approach. In its May 3 Opinion (Appendix A), the Court of Appeals stated: "We conclude that, even if the questions put to appellant have not been demonstrated to be relevant to the grand jury's inquiry, this would not justify his refusal to answer. His invocation of the First Amendment adds

[6] See note 4, *supra*, pp. 6-7.

nothing to his relevancy claim.''[7] 460 F.2d at 332. This view of the First Circuit was reaffirmed upon its reconsideration as shown in its orders of October 13 (Appendix E), November 17 (Appendix H), and November 20 (Appendix I).

II. The Court Below Has Decided Important Questions of Federal Law Which Have Not Been But Should Be Settled by This Court.

A. *Whether the facts in this case require a balancing of the interest of the public in protecting petitioner's confidential sources of information against the interest of the public in requiring petitioner to disclose those sources.*

Even if the Ninth Circuit is not thought to be in direct conflict with the First Circuit, there is certainly need for a further clarification of *Branzburg* since it left undecided some very important issues of federal law.

Since the decision of this Court in *Branzburg* v. *Hayes*, 408 U.S. 665, numerous representatives of the press from all over the country have been subpoenaed to appear before grand juries and courts to testify as to their confidential sources of information.* Many of these reporters have been jailed. The *Branzburg* case indicated that protection would be provided members of the press in appropriate cases, but it left unanswered the parameters of that protection. It is of utmost importance to this country that some guidelines be given to lower courts which seem to have taken the position that no protection is afforded to members of the press, despite the contrary indications of this Court.

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[7] We see no distinction between petitioner's concept of relevance or pertinence and the Ninth Circuit's concept of "substantial connection."

* See Hume, "A Chilling Effect On The Press," The New York Times Magazine, December 17, 1972, pages 13, 82-83.

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This case, unlike *Branzburg, Caldwell,* and *Pappas,* presents an excellent opportunity to confront this issue in the context of a complete record with a great deal of testimony, and with only a few contested questions which present the issue clearly. This case requires a decision on a case-by-case, question-by-question basis. Unlike *Branzburg,* petitioner here had no knowledge of criminal activity. Unlike *Caldwell,* he did appear before the grand jury and testified at some length. Unlike *Pappas,* there is a complete record.

In addition, since the Orders of the Court of Appeals of November 17, 1972, and November 20, 1972, and the position of the government explicitly stated on November 21, 1972, there is no question but that the government sought by these questions the disclosure of confidential sensitive sources, not merely conversations with other scholars.[8]

Therefore, this case presents an opportunity to examine some of the basic issues involved in guiding the lower courts to reach decisions which would give the press the protection still open under the *Branzburg* decision. Petitioner's claim is that the First Circuit should have applied

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[8] Petitioner's Stipulation filed with the Court of Appeals, and rejected by that Court, made clear that he was willing to answer the questions as to conversations with other scholars. (Appendices G, H) Subsequently, on a hearing on a motion to vacate in the District Court, petitioner again indicated that willingness, whereupon counsel for the government stated that the government would not recall petitioner to testify as to conversations with other scholars—that they would call him only if he indicated his willingness to testify as to confidential sensitive sources. (Appendix J, pp. 52-54, *infra*)

In addition, the United States represented to this Court in its Memorandum in Opposition to Petitioner's Application for Stay that petitioner would have the opportunity to answer as to non-confidential sources and to see if the grand jury would "see fit to pursue its inquiry" when it became clear that it was delving into confidential sensitive sources. However, the orders of the Court of Appeals of October 13, 1972, November 17, 1972, and November 20, 1972, changing the Opinion of May 3, 1972, foreclosed that possibility. (Appendices D, H, I) See also the decision of the District Court of November 21, 1972 (Appendix J, pages 56-57)

a balancing test to determine whether the witness' First Amendment claims should be upheld, and that such a test involves the question of relevance or, as the Ninth Circuit put it, whether there was a "substantial connection" between the information sought and the subject under investigation.

Mr. Justice White, speaking for himself and three other Justices, said in *Branzburg* v. *Hayes*, 408 U.S. 665, 708, "... there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation...." The language is not used loosely. The concept of relevance redounds throughout the opinion. *E.g.*, 408 U.S. at 682, 685, 690-691. Most significantly, this Court, in dealing with the case of *Pappas*, held "that [Pappas] must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to 'the propriety, purposes, and scope of the grand jury inquiry and the *pertinence* of the probable testimony.'" 408 U.S. at 709. (Emphasis added).

Similarly, Mr. Justice Powell, concurring, speaks of "the obligation of all citizens to give relevant testimony with respect to criminal conduct." 408 U.S. at 710.

Petitioner's primary claim below was "that, at least when a grand jury inquiry impinges on the First Amendment rights of a witness, a preliminary showing of relevancy is required." *United States* v. *Doe, Appeal of Popkin*, 460 F.2d 328, 331 (1 Cir. 1972). To this claim the Court of Appeals responded: "We conclude that, even if the questions put to appellant have not been demonstrated to be relevant to the grand jury's inquiry, this would not justify his refusal to answer. His invocation of the First Amendment adds nothing to his relevancy claim." 460 F.2d at 332.

The converse of this Court's repeated statement in *Branzburg* of the requirement that a witness "answer the

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relevant and material questions" (408 U.S. at 708) of the grand jury is the absence of a requirement to answer questions which are not relevant to the investigation being pursued. Nonetheless, the Court of Appeals, speaking, albeit before the date of decision in *Branzburg* v. *Hayes*, 408 U.S. 665, expressly rejected petitioner's reliance upon "[t]he concept of relevance" as applicable to grand jury proceedings. *United States* v. *Doe, Appeal of Popkin*, 460 F.2d 328, 331-332 (1 Cir. 1972).

And, it is important to note, it did not do so upon the basis of any distinction between "[t]he informative function asserted by representatives of the organized press" and that "performed by lecturers, political pollsters, novelists, academic researchers [of whom petitioner is one], and dramatists." *Branzburg* v. *Hayes*, 408 U.S. 665, 705.[9]

Petitioner's major contention was that when important First Amendment rights of a witness are asserted, the degree of relevance required increases. Put another way, petitioner proposed a balancing test identical to that proposed by Mr. Justice Powell in his concurring opinion in *Branzburg* v. *Hayes*, 408 U.S. at 709-710, and identical to that applied by the Ninth Circuit in *Bursey*, but which was not applied by the Court of Appeals for the First Circuit here because of its view that petitioner's "invocation of the First Amendment adds nothing to his relevancy claim." 460 F.2d at 331, 332.

This Court did not apply a balancing test in *Branzburg* because none of the three cases dealt with presented the issue as does the case here. Branzburg appeared before

[9] Basic to Petitioner's position is the assumption that the political scientist, writing in the field of contemporary controversial problems of an important nature, stands in the same shoes as a newsman. See Nejelski and Lerman, *A Researcher — Subject Testimonial Privilege: What To Do Before The Subpoena Arrives*, 1971 Wisc.L.Rev. 1085. It is the public's right to information that is sought to be protected.

the grand jury, as did petitioner, but the questions asked of Branzburg "directly related to criminal conduct which he had observed and written about." 408 U.S. at 708. Petitioner here unequivocally testified that he had no knowledge of any criminal conduct. He testified that he had no knowledge of how the Pentagon Papers study had been given to the press other than what he had read in the press accounts. The four "opinion" questions sought information concerning his *opinion* as to whether persons had possession of the study in Massachusetts. The questions as to knowledge dealt only with his knowledge of who worked on the study. The remaining question dealt with conversations about the existence or nature of the study.

Although Pappas appeared before the grand jury and answered certain questions, the record before this Court did not "reveal the specific questions [Pappas] had refused to answer, the expected nature of his testimony, the nature of the grand jury investigation, or the likelihood of the grand jury securing the information it sought by other means." 408 U.S. at 673.[10] Unlike *Pappas,* this case presents a full transcript of the grand jury questioning, the specific questions answered and not answered, the expected nature of the testimony, the nature of the grand jury investigation, and the likelihood of the grand jury securing the information sought by other means. Therefore, this case, unlike *Pappas,* presents an opportunity to apply a balancing test.[11]

Caldwell did not appear before the grand jury. The

[10] The attention of this Court is again invited to the holding of this Court in *Branzburg*, 408 U.S. at 709, that Pappas' future appearance before the grand jury is subject, *inter alia*, to judicial supervision as to "pertinence".

[11] There is no implication in this case, as there was in *Branzburg* and *Pappas*, that any criminal conduct was actually observed. Indeed, the very opposite is the case here.

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Ninth Circuit viewed "the issue before it as whether Caldwell was required to appear before the grand jury at all, rather than the scope of permissible interrogation...." 408 U.S. at 679.

Thus, petitioner's primary contention in the court below was directed toward an important issue expressly left open in *Branzburg* v. *Hayes*, 408 U.S. 665. He contends that his First Amendment claim required a question-by-question determination in the manner suggested by the concurrence of Mr. Justice Powell.

> "[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered." 408 U.S. at 710.

Given the significant distinctions between what is involved here and what was involved in the three cases which were the subject of *Branzburg*, this case is exactly that posited by Mr. Justice Powell. Petitioner's case is the case required to "be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." 408 U.S. at 710.[12]

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[12] Subsequent to the *Branzburg* case, numerous representatives of the press have been subpoenaed to appear before grand juries or courts, and many have been incarcerated. Only the Ninth Circuit seems to have applied the proper standards to protect a witness.

The balancing test.

Exactly what considerations enter the balancing test need not be in issue at this point. Mr. Justice Powell suggests that to be considered in the balance are whether the information sought bears "only a remote and tenuous relationship to the subject of the investigation," and whether the testimony sought "implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710. He would probably accept in addition Mr. Justice Stewart's criteria applied in this context:

> (1) Whether the government has shown that "there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law";
>
> (2) Whether the government has demonstrated "that the information sought cannot be obtained by alternative means less destructive of First Amendment rights"; and
>
> (3) Whether the government has demonstrated "a compelling and overriding interest in the information". 408 U.S. at 743.

The questions petitioner has been ordered to answer fall before any balancing test. They do implicate confidential source relationships and bear only the most tenuous relationship to the subject of the investigation. As the Court of Appeals noted, "the questions asked in the grand jury were of the broadest and most speculative kind, bearing no hallmark that the government had any notion of what Popkin might be able to contribute." 460 F.2d at 336.

Chief Judge Coffin also found, as to the "opinion" questions, that the information sought was probably "as well known to the government experts as to [Popkin] ... Nor

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has the government here shown that it cannot obtain the information it seeks other than by procuring Popkin's opinion." 460 F.2d at 335.

The questions as to the participants in writing the study have no apparent relevance to the commission of any offense, nor did the government offer any explanation in the courts below. Popkin's answers to other questions indicated that the interviews on which any answer would be based took place three or four years before the publication of the study, and no connection can be discerned between the answers to these questions and any violation of law. The questions can only lead to the discovery of who the participants in the study were, and the government already has that information.[13]

The question as to whether petitioner conversed with Daniel Ellsberg concerning the contents or existence of the study seems to have considerable relevance at first appearance. But the relevance disappears when one considers petitioner's testimony "that he had never seen a copy of the Pentagon Papers other than those in mass distribution, that he had not discussed with Daniel Ellsberg the possibility of releasing a copy of the Pentagon Papers to Neil Sheehan . . . , that he had no knowledge other than from public sources as to how various newspapers had obtained copies of the Pentagon Papers, and that he 'was never given definitive information that someone possessed' the Pentagon Papers in Massachusetts." 460 F.2d at 330.

Five of the seven questions ask for the names of petitioner's confidential sources. The other two seek petitioner's opinion based upon information received from his confidential sources. Thus, this case presents directly, as this Court's holdings in *Branzburg* v. *Hayes*, 408 U.S. 665,

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[13] One cannot infer from an informant's knowledge of the participants that the informant had access to the study, since the study does not contain the names of its authors.

do not, the questions of how a balancing test is to be applied to questions by a grand jury which impinge upon First Amendment rights.

B. *Whether a witness before a grand jury, who has been granted limited transactional immunity, is entitled to be advised of the pertinence of questions asked him to the subject under inquiry by the grand jury, if the questions invade his rights to freedom of speech, press and association.*

During petitioner's grand jury appearance, he repeatedly asked that he be informed of the pertinence of the questions to the subject under inquiry by the grand jury. On each occasion, the prosecutor refused to give, or to allow the grand jury to give, any answer. Petitioner argued in the court below that the reasons he needed that information were the same as those of witnesses who appear before legislative committees. *E.g., Watkins* v. *United States,* 354 U.S. 178 (1959); *Scull* v. *Commonwealth of Virginia,* 359 U.S. 344 (1959).

Similarly to the case of the petitioner in *Scull* v. *Virginia,* 359 U.S. 344, 352 (1959), it was "unmistakably clear that the [grand jury's] investigation touched an area of speech, press and association of vital public importance." As in the case of *Scull,* we urge that petitioner should have had "an opportunity of understanding the basis for the questions or [a] justification on the part of the [grand jury] for seeking the information he refused to give." *id.,* at 353. See *Watkins* v. *United States,* 354 U.S. 178, 207-209 (1957), in which the holding was on a statutory basis rather than, as in *Scull,* and as we contend here it should be, on a constitutional basis.

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Furthermore, in cases such as this, where immunity is granted only in a limited area[14] (here violations of 18 U.S.C. §793), the witness must be able to make a sound judgment as to whether the question falls within the grand jury's power. This is unlike the usual grand jury case since the legislature has specifically limited the power to grant immunity to limited situations, and the grand jury has no power to force a witness to answer questions not pertinent to the particular authorization. *Bursey* v. *United States*, 466 F.2d 1059, 1073-1079, *rehearing denied*, 466 F.2d 1090, 1091 (9th Cir. 1972); *In re Vericker*, 446 F.2d 244, 247-248 (2nd Cir. 1971). The Court of Appeals rejected petitioner's argument that a witness is entitled to be informed as to pertinency, primarily on the ground that such information might involve a breach of secrecy. 460 F.2d at 331-332. However, the Ninth Circuit convincingly stated its disagreement, noting that when disclosure in a particular case would not impair the objectives of secrecy, disclosure should not be denied. *Bursey* v. *United States, supra*, at 1091-1092. Here, the limited disclosure necessary to advise the witness as to pertinency (if, indeed, any were necessary at all) would not in any way have impaired the objectives of grand jury secrecy. Perhaps in some instances such disclosure would be prohibitively harmful, but such a constitutional claim should be decided on a case-by-case basis, balancing the interests at stake. Here, the government's interest in secrecy was at best *de minimis*.

The importance of disclosure of pertinency, especially in cases involving First Amendment rights, has been reiterated firmly by this Court. *Watkins* v. *United States, supra; Scull* v. *Commonwealth of Virginia, supra; Jones* v. *Securities and Exchange Commission*, 298 U.S. 1, 26.

While there have been, until very recently, few cases involving the investigative powers of grand jurors, the

[14] 18 U.S.C. §§ 2514, 2516.

recent *Branzburg* decision emphasizes the need for relevance. This is simply a further explication of the principles stated in Fourth Amendment cases such as *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209; *Hale* v. *Henkel*, 201 U.S. 43, 77.

As Mr. Justice Frankfurter said in *Watkins*, *supra*, at 217:

> "The questions must be put with relevance and definiteness sufficient to enable the witness to know whether his refusal to answer may lead to conviction for . . . contempt and to enable both the trial and appellate courts readily to determine whether the particular circumstances justify a finding of guilt."

This case is very much like *Watkins* in that the grand jury had only a limited power to investigate under the grant of immunity, and its power to make inroads into areas protected by important First Amendment rights was limited as well. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 245, 247-248, 250-251, Frankfurter, J., concurring at 261. As Mr. Justice Powell stated in concurring in *Branzburg*, *supra*, 408 U.S. at 710, the witness will be protected where the information sought bears "only a remote and tenuous relationship to the subject of the investigation," or where there is no legitimate need of law enforcement.

As in *Watkins*, the first step in protecting a witness who interposes a substantial claim to protection, either because of First Amendment rights or a limited immunity, is to require a disclosure of pertinency, at least where that disclosure does not substantially impair the purposes for grand jury secrecy.

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Conclusion

For the foregoing reasons, the petition for the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 72-1090

UNITED STATES OF AMERICA

v.

JOHN DOE

SAMUEL L. POPKIN,

APPELLANT.

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

May 3, 1972

COFFIN, *Circuit Judge.*

This is an appeal by Samuel Popkin from an order of the district court holding him in civil contempt for refusing to answer certain questions propounded to him by a federal grand jury in Massachusetts. An assistant professor of government at Harvard University, Popkin has written numerous articles on the war in Indochina.[1] He contends first that he should not be forced to respond without a demonstration by the government of the relevance of both the general inquiry and the specific questions. He urges also that he should be excused from answering those questions by virtue of a scholar's First Amendment privilege not to divulge his sources of information insofar as those sources are confidential and supply him with informa-

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[1] According to his affidavit, which lists his published works, Popkin has written on a number of war-related subjects ranging from the war's effect on Vietnamese village life and the use of herbicides to more general questions of American policy in Southeast Asia. The affidavit further states that he is presently writing a book "involving the war in Viet Nam and its origins", and that he is a researcher at Harvard's Center for International Affairs and a member of the editorial board of the journal "Public Policy".

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tion relating to his field. Finally, he claims that he need not testify until the government has disclaimed the use of illegal electronic surveillance.

The grand jury which issued a subpoena to Popkin is the same as that involved in United States v. Doe (Mike Gravel, United States Senator, Intervenor), 455 F.2d 753 (1st Cir. 1872), cert. granted, 405 U.S. ——, 92 S. Ct. 1243, 31 L. Ed. 2d 450 (Feb. 22, 1972 [hereinafter *Gravel*]).

In ordering Popkin to testify, the district court found that the grand jury is "engaged in an inquiry into alleged violations of Chapter 37 [Espionage and Censorship] and Sections 2314 [Transportation of stolen goods etc.] and 2315 [Sale or receipt of stolen goods etc.] of Title 18, United States Code", with its primary focus the dissemination of the classified Defense Department study known as the Pentagon Papers.

Popkin was first subpoenaed to appear before the grand jury on August 19, 1971. Before that date, he moved to quash the subpoena and for disclosure of electronic surveillance, which motions were denied. The grand jury did not, however, ask him to testify at that time. He received a second subpoena to appear before the grand jury on October 13. Having refused to testify on October 14, he was ordered to reappear on October 27. On that date, he filed motions, supported by his own affidavit and those of twenty-four other social scientists, for an order to protect him from inquiry as to "information obtained by him in his capacity as a scholar, author and teacher", for a transcript of his testimony, and for disclosure of surveillance. After these motions were denied on October 28, Popkin was granted immunity from prosecution and ordered to testify. Again excused, he was not subsequently required to appear until January 18, 1972. His renewed motions for a protective order for a transcript were denied. Upon his refusal to answer three questions, the government sought

and obtained a contempt order on March 21. Popkin purged himself of contempt by answering these three questions on March 27, then answered further questions but, relying on his asserted First Amendment privilege as a scholar, refused to answer a number of other questions. Motions for a protective order and for disclosure were again denied on March 29, and he was held in contempt. He now appeals from the March 29 contempt order.

The district court, without opinion, based its contempt order on Popkin's refusal to answer nine questions, of which the government now presses seven. In order to understand the scope of Popkin's refusal to testify, it may be useful first to sketch the relevant parts of his testimony in response to the questions he did answer. He did state, among other things, that he had never seen a copy of the Pentagon Papers other than those in mass distribution, that he had not discussed with Daniel Ellsberg the possibility of releasing a copy of the Pentagon Papers to Neil Sheehan (of the *New York Times*), that he had no knowledge other than from public sources as to how various newspapers had obtained copies of the Pentagon Papers, and that he "was never given definitive information that someone possessed" the Pentagon Papers in Massachusetts. In addition, Popkin admitted having an opinion that certain unnamed persons had possession of the Pentagon Papers in Massachusetts, explaining that this opinion was formed on the basis of conversations "with numerous persons about numerous decisions and documents, I see now that a lot of those decisions and documents are in the Pentagon Papers".

The questions Popkin refused to answer represent three lines of inquiry which, while overlapping, we will consider separately. One line of inquiry attempted to identify the participants in the Pentagon Papers study or, more precisely, persons having knowledge as to who participated

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in the study. This inquiry began with the question: "Who are the persons you interviewed in order to acquire this knowledge of who participated in the Pentagon Papers study?" (chronologically, question 2). This was followed, after Popkin had declined to answer and had indicated in response to subsequent questions that it had never been his research object to discover who participated in the study, by the colloquy (question 3):

> "Q. Who are those persons to whom you are referring with regard to conversations in the District of Massachusetts which led you to the knowledge of who are the participants in the Pentagon Papers study?"
>
> * * * * * *
>
> "Q. Would you please name them?
>
> A. I respectfully and regretfully decline [etc.]."

The second line of inquiry is more explicit and is self-explanatory. Popkin refused to answer the question "Did Daniel Ellsberg ever discuss with you the content or existence of the Pentagon Papers between January 1, 1971 and June 13, 1971?" (question 4).

The third line of inquiry, finally, related to his conceded opinion as to possession of the Pentagon Papers, beginning with the question: "[W]hat is the opinion as to persons you believe possessed a copy of the Pentagon Papers in Massachusetts prior to June 13, 1971." (question 1). The line of inquiry was then temporarily dropped, but was later resumed by repetition of the question (question 5). Subsequently, he refused to answer the question "Would you please name them, those persons who furnished you information which caused you to form an opinion as to persons you believe possessed a copy of the Pentagon Papers in Massachusetts prior to June 13, 1971?" (question 6) and the similar, but somewhat more focussed, question "Who was the conversation with discussing the documents or

decisions indicating that person had knowledge or possession of the Pentagon Papers?" (question 7).

We first discuss appellant's concept that, at least when a grand jury inquiry impinges on the First Amendment rights of a witness, a preliminary showing of relevancy is required. Despite the longstanding doctrine of Blair v. United States, 250 U.S. 273, 282, 39 S. Ct. 468, 471, 63 L. Ed. 979 (1919), that a grand jury witness is "not entitled to urge objections of incompetency or irrelevancy" appellant relies on such legislative inquiry cases as Watkins v. United States, 354 U.S. 178, 77 S. Ct. 1173, 1 L. Ed. 2d 1273 (1957) and Scull v. Commonwealth of Virginia, etc., 359 U.S. 344, 79 S. Ct. 838, 3 L. Ed. 2d 865 (1959).

We are in effect being asked to make new law on the basis of the assumption that grand jury and legislative inquiries function in so similar a fashion that they should be treated alike. The argument, so considered, is not without initial appeal. But a legislative investigation has as its object the resolution of a previously identified problem of a general nature. The power, while broad, is limited to advancing the general resolution. To the extent that individuals can supply information related to the legislative task, they must respond. When the broad brush seeks not only to paint the scene but to detail individual portraits unnecessary to that scene, it ventures too far. The concept of relevance to the legislative purpose is necessary to preserve the boundary between the legislative and the individual, and can ordinarily be enforced by reference to statements of purpose and prior testimony which are already matters of public record.

A grand jury generally has a much smaller object in view, but one in which society has intense interest. At least when inquiring into specific crimes, a grand jury paints with a small brush and necessarily with painstaking detail. Its purpose is to see if there is probable cause to believe

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that particular crimes have been committed by particular persons, although further crimes and perpetrators may be discovered in the course of taking evidence. In either case, the number of facts which would help to identify the crime and the criminal may well be few, and the relevance of one fact may only become apparent after another is uncovered. Thus while the public product of a grand jury is a limited number of indictments, its processes may include the pursuit of numerous strands of evidence, many of which may ultimately be of no use, but none of which can safely be abandoned. From another perspective, even where a grand jury is working on the clear hypothesis of a prosecutor, its success may often depend upon its ability to offer to witnesses a guarantee of secrecy and to suspects the protection of secrecy unless probable cause is found to indict. Any meaningful statement of relevance in response to a witness's request would entail the naming of suspects and the description of prior testimony. Even if a present witness has no wish for secrecy, disclosure would injure other witnesses and suspects. We therefore reject appellant's argument based on the asserted similarity of this grand jury to a legislative hearing.

Appellant also attempts to draw support for a rule of relevance from Fourth Amendment cases, such as Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209, 66 S. Ct. 494, 90 L. Ed. 614 (1946). As to this, we deem sufficient Judge Hamley's reference in United States v. Weinberg, 439 F.2d 743, 749 (9th Cir. 1971), to the following language of Judge Zirpoli in In re Grand Jury Witnesses Sherrie Bursey and Brenda Joyce Presley, 322 F. Supp. 573, 576 (N.D. Cal. 1970):

> "The grand jury does not need to have probable cause to investigate; rather its function is to determine if probable cause exists. And if probable cause is not required to investigate, it follows that probable

cause is not required to make the preliminary showing necessary to call a witness whose testimony may shed light on criminal activity . . . ."

[1] We conclude that, even if the questions put to appellant have not been demonstrated to be relevant to the grand jury's inquiry, this would not justify his refusals to answer. His invocation of the First Amendment adds nothing to his relevancy claim in the context of a grand jury investigation. Whether he has presented a First Amendment claim strong enough to be treated as a constitutional privilege is a separate question.

In determining whether appellant may refuse to answer any or all of these questions, we are presented, as in *Gravel*, with a confrontation of constitutional power and constitutional privilege, heightened by similar overclaiming on each side. Here also there is little direct precedent to guide us, and though the Supreme Court may soon pronounce law that bears on the balance between the power of the grand jury and First Amendment privileges,[2] we may not await its decision.[3]

The government argues that the scholar's privilege is a creature not to be found in the province of jurisprudence; that the closest analogue, a reporter's privilege, recognized by the Ninth Circuit in Caldwell v. United States, 434 F. 2d 1081 (9th Cir. 1970), cert. granted, United States v.

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[2] Argument has been heard in United States v. Caldwell, *infra*, 40 U.S.L.W. 3405 (Feb. 22, 1972). The precise issue in that case is whether a reporter, claiming a freedom of the press First Amendment right, can be compelled to appear before a grand jury, even though he has already been given the protection of an order barring inquiry into his confidential sources. The witness here is making the narrower claim that, having complied with a subpoena, he may refuse to answer certain questions.

[3] 28 U.S.C. § 1826(b) requires that we decide this appeal within thirty days after it was filed. We recognize that we have not quite met our deadline. Although we gave this matter first priority, when faced with the choice of exceeding the statutory period or sacrificing deliberation, we chose the former.

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Caldwell, 402 U.S. 942, 91 S. Ct. 1616, 29 L. Ed. 2d 109 (1971),[4] has been otherwise uniformly rejected by the courts; and that even if *Caldwell* was correctly decided, appellant falls outside its compass, his relationship with his sources not being so intimate as in *Caldwell*, nor covered by the special canopy of free press, and the grand jury being engaged in a specific rather than a general investigation. Appellant discounts the lack of precedent as stemming from the past absence of efforts to invade a scholar's privilege. He claims to serve a public interest fully as vital as that served by a reporter, which interest would be as grievously imperilled by a forced disclosure of his sources, absent a showing of compelling need by the government.

In *Gravel, supra*, we held that the Speech and Debate Clause was sufficient to block a grand jury from inquiring of a Senator and his aides about the receiving and preparation for legislative publication, the publication, and any official republication of the Pentagon Papers. Our decision, we recognized, could substantially frustrate a grand jury, for the transactions embargoed from inquiry might encompass a crime. But we thought the result compelled by the Speech and Debate Clause, which is not involved here.

[2] For perspective, it is important to recognize what has not been and could not successfully be argued here. Appellant could not, for example, cite his discomfort in being asked to testify about others. Although the discomfort is real, it is shared by all grand jury witnesses. Indeed, a witness called before a grand jury investigating organized crime may legitimately fear for life and limb. Nor can ap-

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[4] See also Nejelski & Lerman, A Researcher-Subject Testimonial Privilege: What To Do Before the Subpoena Arrives, 1971 Wisc. L. Rev. 1085; Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970).

pellant stand on a claim, however justified, that his livelihood as a researcher is threatened. His privilege, if it exists, exists because of an important public interest in the continued flow of information to scholars about public problems which would stop if scholars could be forced to disclose the sources of such information. Appellant is a political scientist. As is true of other behavioral scientists, his research technique rests heavily on inquiry of others as to their attitudes, knowledge, and experience. Often such inquiry is predicated on a relationship of confidence. The question posed to us is whether this relationship gives a scholar a constitutionally based privilege not to testify which others do not possess.

Although both parties have cast their arguments in these broad terms, the substantiated rationale of appellant and the questions put by the grand jury do not, in our opinion, quite meet head on. The overwhelming majority of appellant's affidavits from other scholars lay stress on the importance of a two-way communication between participants in decision making (or those affected) and scholars. The asserted importance of non-disclosure of a network of sources lies in the necessity for a continued flow of inside information to the sphere of scholarly reporting, assessment, and criticism, a flow made particularly important by the selective and self-serving release of information by other, particularly higher officials.[5] In short, the thrust of the asserted privilege bears on the right of the scholar not to disclose the identities of his "contacts and sources", those officials and non-governmental actors within the pur-

[5] This assertion seems buttressed by other experienced observers of the national scene. C. L. Sulzberger, in A Long Row of Candles -- Memoirs & Diaries 1934 — 1954 (MacMillan, 1969), states at p. xvi: "May I only summarize by saying these things. Rule A for a newspaperman is that 'leaks' are the food of the trade; and over the years I have found that, as with the best drinks, the leak always fizzes from the top. The desire for indiscretion at the upper level seems compelling."

view of his specialty whose actions, knowledge, and views give him the primary data for his work.[6] The reason for the claimed privilege lies not in the importance of protecting the officials and other sources *per se* but in the importance of preserving the flow of their communications via scholars to the public domain.

This underlying rationale falls short of immunizing a scholar from testifying about conversations with those who are not his sources. Of course a scholar may also be an official or such a participant in an activity that he is also a sensitive source. But to the extent that a scholar qua scholar is asked about statements made to him by other scholars we do not conceive of him as in any different position from that of a doctor asked about his conversations with other doctors, or a lawyer about his talks with other lawyers. Nor is there reason to believe that scholars, as opposed to public officials, will lose their jobs and thus their usefulness as sources if the contents of their conversations are revealed to a grand jury. And while we acknowledge that scholars customarily discuss their work with colleagues and in doing so may perhaps violate confidences, a privilege which would give comprehensive protection to such collateral discussions would make scholars a uniquely privileged class in the broadest sense.

[3] We therefore conclude that the two questions seeking the names of persons interviewed who gave him knowledge of participants in the Pentagon Papers study should be answered, at least to the extent that the persons were not government officials or other participant-sources. One

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[6] A resolution of the Faculty Council of the Harvard Faculty of Arts and Sciences, which appellant calls to our attention, takes a similar approach. It states, in part, that

"Without such a demonstration [of a strong need] or a showing that the questions relate to the scholar's own participation or direct involvement in the commission of a crime, a scholar should be permitted to refuse to answer questions about his contacts and sources." (Jan. 19, 1972).

of the questions, relating to persons in Massachusetts, seems not to be directed either to foreign affairs, intelligence, or defense officials in government or to any person, in or out of the government, in Vietnam. Were it to become clear that a question delved into confidential relationships with such persons, we are not sure that the grand jury would see fit to pursue its inquiry. If it did, however, we would at least have a factual setting enabling us to address the issue less theoretically.

This analysis also disposes of the question asking whether Ellsberg discussed with appellant the content or existence of the Pentagon Papers between January 1 and June 13, 1971. There is no representation that Ellsberg during that period was a government official, or otherwise a sensitive source, or even that Popkin had established a confidential relationship as to these matters with Ellsberg when the latter was a public official.

What this analysis does not dispose of is the remaining group of questions seeking appellant's opinion concerning who might have possessed the Pentagon Papers generally or in Massachusetts and the persons with whom he talked who gave him a basis of that opinion. Appellant had candidly testified that, while he had no knowledge of possession in Massachusetts, he had formed opinions over the years as to persons he thought had had access to the Papers. This kind of inquiry, at least in the present posture of this case, does not appeal to the author of this opinion. Appellant in his brief has asserted that he knows of no case where a witness has been held in contempt for refusing to give an opinion. Nor do I. In the long run, the quest for opinions would not be a useful investigative tool. If appellant were forced to answer, scholar-sleuths would in the future think long and hard before admitting to an opinion, and grand juries would be without workable means for forcing them to do so.

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Beyond this, and more to the point, the previously stated basis for his opinion lay in matching the content of conversations he had had with the content of what subsequently publicly appeared, and deducing that the source was the Papers. Appellant testified that many people had publicly admitted having had access to the Papers or copies thereof. It is reasonable to assume that much of the work forming the basis of appellant's judgment is as well known to government experts as to appellant. In this connection, note the statement, in the Attorney General's instructions regarding subpoenas to the press, that "The Department of Justice does not consider the press 'an investigative arm of the government' " (quoted in Levin v. Marshall, 317 F. Supp. 169, 173-174 (D. Md. 1970). Nor has the government here shown that it cannot obtain the information it seeks other than by procuring Popkin's opinion.

[4] The generality of the opinion questions here, the apparent basis for the opinion being pursued, and the idea of using one scholar to speculate about the sources of others' work, without any showing of strong need therefor, are repugnant to me. In my view, even apart from constitutional claims, we should exercise our supervisory power to state that in this circuit scholars ought not to go to prison for refusing to give their opinions or beliefs based on casual and retrospective reflections on similarities of content. But while my brothers agree that the opinion questions were improper, their objection is a narrower formal one. *See infra.* Accordingly, at present we simply disapprove the questions as asked.

In addition to appellant's relevancy and First Amendment justifications for refusal to answer, he asserts that he is under no further duty to testify until the government makes a satisfactory disclosure that no illegal electronic surveillance has tainted the questioning. We have traced

the history of appellant's attempts to force disclosure, the last and most formal and specific motion being filed on March 28, the day after his last grand jury appearance, and specifying as the ground for his claim that he had been asked his telephone number.

[5] It may be, as a majority of the Third Circuit held in In the Matter of Egan, 450 F.2d 199 (3rd Cir. 1971), cert. granted United States v. Egan, 404 U.S. 990, 92 S. Ct. 531, 30 L. Ed. 2d 541 (Dec. 14, 1971), that a grand jury witness has standing in a civil contempt proceeding to raise as a defense the prohibition in 18 U.S.C. § 2515 against the introduction of evidence based upon electronic surveillance, or, as a majority of a District of Columbia Circuit panel held in In re Evans, 452 F.2d 1239 (D.C. Cir. 7AE7), that a grand jury witness has standing under 18 U.S.C. § 2518(10) (a) to make a motion to suppress, or that he has standing under 18 U.S.C. § 3504(a) to make the government affirm or deny the use of illegal electronic surveillance. On the other hand, it may be that he has standing under none of these sections. United States v. Gelbard, 443 F.2d 837 (9th Cir. 1971), cert. granted, Gelbard v. United States, 404 U.S. 990, 92 S. Ct. 529, 30 L. Ed. 2d 540 (Dec. 14, 1971). We do not reach the question because we find that Popkin, even if he has standing, has failed to make sufficient claim that the issuance of the subpoena or the asking of questions is the product of illegal surveillance.

Section 2518(10) (a) indicates that a motion to suppress evidence obtained by illegal electronics surveillance may be made on any one of three "grounds"[7] and that "[s]uch

[7] The possible grounds are that

"(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10) (a).

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motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." The language of § 3504(a) (1) — "upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act" — carries with it, we think, a similar responsibility on the aggrieved party to make a threshold showing, although the threshold may be considerably lower. *See* In re Evans, *supra*, 452 F.2d at 1268 (Wilkey, J., dissenting), and the legislative history detailed there. And while § 2515 contains no comparable requirement, neither does it explicitly provide a remedy. Any implied remedy would, in our view, import a requirement of some showing of basis for suspecting illegal action. Otherwise, the two last cited sections would in effect have enacted an automatic disclosure rule, which we do not think the Congress intended.[8]

At the same time, we note the statement of Chief Judge Bazelon in In re Evans, *supra*, 452 F.2d at 1247, that the duty of the government to disclose under § 3504(a) (1) "is triggered . . . by the mere assertion that unlawful wiretapping has been used", and are sensitive to the concern which underlies it.[9] We recognize full well that it is difficult, and perhaps impossible, particularly in the early stages of a case when he is called before the grand jury, for a witness to know that he has been the subject of elec-

[8] Judge Wilkey's dissent in In re Evans sketches some of the costs and complexities of making a disclaimer. 452 F.2d at 1255. Even if a disclaimer is not or need not be quite so great an ordeal as is there indicated, it is nevertheless true that sufficient delay and expense are involved to suggest that Congress must have known as much and not intended that, in effect, every subpoena to every grand jury witness have attached to it a disclaimer or log of surveillance.

[9] Even this must be read in light of his later statement that the claim in the case before him was not "patently frivolous", 452 F.2d at 1250.

tronic surveillance. We would concede the absurdity of requiring precise information about a surveillance, which, unless poorly done, could not be pin-pointed by the victim. Because of the elusive nature of electronic surveillance, adequate grounds might be gleaned from a number of circumstances, including subject matter, association, coincidence or events.

In the present case, the district court found no such circumstances as would lead it to suspect illegal electronic surveillance. At one stage of the proceedings, on January 18, by way of preliminary questioning, the grand jury asked his name, his address, and his telephone number. The last question was asked again and answered on March 27. We can attach no sinister inference to the fact that the government sought to record these identifying items. The telephone number was in the telephone book. If we drew any inference as to surveillance it might be, in the light of the history of the Pentagon Papers investigation, *cf.* In re Marx, 451 F.2d 466 (1st Cir. 1971), that the government wanted to be ready to prepare a disclaimer if the court ordered it, which, of couse, it never did. Furthermore, the questions asked in the grand jury were of the broadest and most speculative kind, bearing no hallmark that the government had any specific notion of what Popkin might be able to contribute. On this record, we do not think that the district court erred in refusing to compel the government to affirm or deny illegal electronic surveillance.

The government makes a further point. Although Popkin filed motions to the court raising the matter of illegal surveillance, when he refused to answer questions on March 27 he asserted at length the First Amendment privilege which had been the basis of his original affidavit, but made no mention of his allegation or defense of electronic surveillance. The government says this was a waiver, and

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suggests that the grand jury might accept the claim. While we need not and do not decide whether his actions constituted a waiver, because of his failure adequately to claim illegal electronic surveillance at any time, we believe it behooved him, patricularly with the *Marx* precedent before him, to reassert the surveillance point when he refused to answer.

Affirmed in part, reversed in part.

ALDRICH, Chief Judge (concurring).

We are, to the extent that we are asked to recognize any privilege here at all, exploring very new ground, and while Judge McEntee and I agree with the result, and much of Judge Coffin's opinion, our cast would be somewhat different. A minor difference relates to Judge Coffin's approach to the questions about Popkin's "opinions" as to who had had possession of the Pentagon Papers. Our only objection to those questions is the semantic one that they are badly phrased. What, after all, is meant by an opinion? Had the question been, "Is there anyone who you have reason to believe had possession of the papers in Massachusetts, and what are the reasons?" it would have seemed just the sort of inquiry that might lead to something useful. One cannot expect gold with every stroke of the pick.

Of more significance, we are not so sure on what the court calls "decision-making (and those affected)" sources. A valuable, confidential source may be at a very low, and even unrelated level. If what is sought to be protected is the public interest in information, should not the need of confidentiality be the test, not the position of the source?

This question leads us to a dilemma. What assurance does a court have that there is a need of confidentiality in the particular case? Popkin, if we judge from his oral argument, believes that he should have an all-encompassing mantle in whatever may be his field, so that he can be

known as a "safe" man to talk to. We do not read Judge Coffin as going that far; nor would we. But where does one stop?

Perhaps I am old-fashioned, but I was taught that a scholarly study was valuable to the extent that it disclosed its sources. How does Popkin know that he, and hence his public, is not being horn-swoggled by a "source"? Is there great public worth in a book, the reference table of which consists of a bare curriculum vitae of the author?

The answer may be yes, and may be no. I am tempted to wonder, though I hope uncharacteristically, if too much is not being asked of the First Amendment. Hearst could consider Walter Winchell so valuable to it that it was willing to agree that, in case of a libel suit, it would pick up the tab and not require him to divulge his source. Is the public so interested in research that the government finds itself with a similar, although diminshed in scope, contract of immunity from disclosure with every Ph.D.? If so, we believe it should be in very narrow limits. Happily this case does not call for them to be defined.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 72-1090.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

SAMUEL LEWIS POPKIN,

APPELLANT.

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

ORDER OF COURT

Entered May 17, 1972

The motion to stay mandate is allowed until further order of court — said matter to be reconsidered at the close of the Supreme Court Term in June, 1972.

By the Court:

(s) DANA H. GALLUP
Clerk.

[Cert. cc: Clerk, U.S.D.C., Mass.;
cc: Messrs. Homans and Reese.]

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 72-1090.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

SAMUEL LEWIS POPKIN,

APPELLANT.

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

MEMORANDUM AND ORDER

Entered: July 12, 1972

The Court, after hearing, is of the view that its opinion of May 3, 1972, requires revision in the light of certain recent decisions of the Supreme Court. It is hereby ordered as follows:

1. The government shall, if it be able to do so, file a disclaimer of any pertinent electronic surveillance in the form and substance approved by this Court in In re Marx, 451 F.2d 466.
2. Upon the filing of such disclaimer this Court will reconsider in the light of those cases the merits of appellant's opposition to the orders of the district court holding him in contempt. It will then issue a new order, from which appellant, or the government, may, if desired, seek certiorari.

No purpose would be served in appellant seeking cert-

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iorari at this time. The stay, previously entered, is to remain in force.

By the Court:

DANA H. GALLUP,
Clerk

By: (s) FRANCIS P. SCIGLIANO
Chief Deputy Clerk

[Cert. cc: Clerk, U.S.D.C., Mass.;
cc: Messrs. Homans and Reese.]

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 72-1090.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

SAMUEL LEWIS POPKIN,

APPELLANT.

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

MEMORANDUM AND ORDER

Entered October 13, 1972

The government having, in response to our memorandum and order of July 12, 1972, filed a sufficient disclaimer of electronic surveillance, the court makes the following rulings.

The order of contempt with respect to the following questions will be affirmed unless within 21 days appellants stipulate in writing to answer them upon demand.

> Who are the persons you interviewed in order to acquire this knowledge of who participated in the Pentagon Papers study?
>
> Who are those persons to whom you are referring with regard to conversations in the District of Massachusetts which led you to the knowledge of who the participants were in the Pentagon Papers study?
>
> Did Daniel Ellsberg ever discuss with you the content

or existence of the Pentagon Papers between January 1, 1971, and June 13, 1971?

No further stay will be granted to seek certiorari.

Without expressing an opinion as to any other question asked, the court vacates the orders of the district court with respect thereto without prejudice, and remands the case to the district court for further proceedings, and questioning of appellant, if such be desired. In passing upon the propriety of questions, the district court shall disregard our opinion of May 3, 1972 to the extent that it concludes that the recent decisions of the Supreme Court require its modification.

By the Court:

(s) DANA H. GALLUP

Clerk.

[Cert. cc: Clerk, U.S.D.C., Mass.;
cc: Messrs. Homans and Reese.]

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 72-1090.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

SAMUEL LEWIS POPKIN,

APPELLANT.

ORDER OF COURT

Entered: October 30, 1972

It is ordered that the Memorandum and Order entered herein on October 13, 1972, be, and the same hereby is, amended by striking the "21 days" appearing in the second paragraph and substituting therein "28 days".

By the Court:

(s) DANA H. GALLUP

Clerk.

[Cert. cc: Clerk, U.S.D.C., Mass.;
cc: Messrs. Homans and Reese.]

APPENDIX F

United States Court of Appeals
For the First Circuit

No. 72-1090.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

SAMUEL LEWIS POPKIN,

APPELLANT.

ORDER OF COURT

Entered November 7, 1972

Upon motion,

It is ordered that the memorandum and order entered herein on October 13, 1972, as amended on October 30, 1972, be, and the same hereby is, amended by striking "28 days" and substituting therefor "37 days".

By the Court:

(s) DANA H. GALLUP

Clerk.

[Cert. cc: Clerk, U.S.D.C., Mass.;
cc: Messrs. Homans and Reese.]

APPENDIX G

United States Court of Appeals
For the First Circuit

No. 72-1090.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

SAMUEL LEWIS POPKIN,

APPELLANT.

STIPULATION OF APPELLANT

The United States has interpreted the questions specified in this Court's Order of October 13, 1972, as asking only for the "disclosure of personal contact with fellow scholars concerning the mechanics of the production and dissemination of the 'Pentagon Papers' study" (Memorandum* p. 4), and that "here, the witness is questioned not about his sources but merely about conversations with other scholars." (Memorandum p. 3) In light of those representations, I hereby stipulate that upon demand I will answer those questions. My refusals have always been directed toward questions requiring disclosure of confidential sources of a sensitive nature, not those relating merely to other scholars.

(s) SAMUEL LEWIS POPKIN
SAMUEL LEWIS POPKIN

* "Memorandum" refers to the "Memorandum For the United States In Opposition" submitted to the United States Supreme Court by the Solicitor General in response to my Application For Stay. The Memorandum is attached hereto.

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APPENDIX H

United States Court of Appeals
For the First Circuit

No. 72-1090.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

SAMUEL LEWIS POPKIN,

APPELLANT.

MEMORANDUM and ORDER

Entered November 17, 1972

The court is offered a stipulation in which, although Popkin states he will answer the questions recited in the court's order of October 13, 1972, he purports to express reasons and possible qualifications. The court did not ask for accompanying statements, and does not understand why they have been expressed. It does not care, by accepting the stipulation, to incur the possibility that it has agreed to conditions or limitations for the future. As it regards Popkin's remarks as imponderables in one sense of the word or another, the clerk is directed not to accept the stipulation for filing, and to return it to counsel.

By the Court:

(s) Dana H. Gallup

Clerk.

[Cert. cc: Clerk, U.S.D.C., Mass.;
cc. Messrs. Klubock and Reese.]

APPENDIX I

United States Court of Appeals
For the First Circuit

No. 72-1090.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

SAMUEL LEWIS POPKIN,

APPELLANT.

Before COFFIN, *Chief Judge,*
ALDRICH and MCENTEE, *Circuit Judges.*

MEMORANDUM and ORDER
Entered November 20, 1972

On March 29, 1972 the district court ordered Samuel Lewis Popkin confined forthwith until he answered nine specified questions asked by a grand jury. On the same day it admitted him to bail pending termination of his appeal from said order. Thereafter, under date of May 3, 1972, in connection with an opinion addressed to the merits we indicated that the government should disclaim, if it properly could, any pertinent electronic surveillance. On May 17, we stayed our mandate pending Popkin's proposed petition for certiorari. On September 29 the government filed an appropriate disclaimer, and on October 13 we announced that the order of contempt would be affirmed and the stay terminated unless Popkin, within 21 days, stipulated in writing that he would answer three specified questions. This period was subsequently extended to today.

In the meantime, Popkin had applied to the Supreme Court for a stay of our order. On November 10, 1972, the Supreme Court denied Popkin's request.

On November 16 Popkin sought to file a stipulation that he would answer the questions, but to which he added what appeared to the court to be qualifications or conditions. The court ordered the stipulation returned to him for that reason. Today's filing time (5:00 PM) having expired without further action on his part, and Popkin having had ample time in general, and ample opportunity in particular to file a revised stipulation if, in fact, he did not consider the statements in the stipulation originally tendered to be meaningful, the mandate enforcing our order of October 13 is released forthwith with the notation that all stays and all orders of release on bail are herewith terminated.

By the Court:

(s) DANA H. GALLUP

Clerk.

[Cert. cc: U.S. Marshal; cc: Messrs. Klubock and Reese.]

APPENDIX J

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EBD 71-210-G

UNITED STATES OF AMERICA
v.
JOHN DOE

Before: Hon. W. Arthur Garrity, Jr., District Judge.

Court Room No. 5
Federal Building
Boston, Massachusetts
November 21, 1972

Appearances:

Richard E. Bachman, Esq., Assistant United States Attorney, for the government.

Daniel Klubock, Esq., and Derek Bok, Esq., for the defendant.

[2] PROCEEDINGS

The Clerk: Emergency Business Docket Number 71-210, United States of America versus John Doe.

* * *

The Court: Well, I am going to ask either Mr. Klubock or Mr. Bok, or both of them, but I want to get to you on another question first. I want to be sure I understand your understanding of Assistant Attorney General Olson's statement. If I understand correctly, you believe that this plan not to reconvene the grand jury is one that is dependent upon Mr. Popkin's refusal to answer questions, but if he plans to answer the questions, and perhaps either

in whole or in part, I don't know whether that refinement was inquired into, but if he plans to disclose the names of scholars, as distinguished from confidential sources, and if he further proposes—and here we don't have the scholar-confidential source problem—if he says he is going to answer Did Daniel Ellsberg discuss the Pentagon Papers with him, you are going to reconvene the grand jury.

Mr. Bachman: Yes.

The Court: Is that the situation?

Mr. Bachman: If he indicates that he will answer.

The Court: Well, you have heard through Mr. Klubock that he will answer Question 3 about conversations with Mr. Ellsberg. That is what Mr. Klubock just said after talking with him. Mr. [3] Klubock also said that he would name names in response to Questions 1 and 2, but they would just be scholars, not confidential sources. So on that basis, what is the government's intention as you understand it? Maybe you should talk to Mr. Gabriel.

Mr. Bachman: If I may talk with Mr. Gabriel for a moment.

Mr. Klubock: Your Honor—

The Court: Well, let him talk, and then I will get back to you.

[Mr. Bachman conferred with Mr. Gabriel.]

Mr. Bachman: I can answer it this way, your Honor: If Mr. Popkin indicates that he is willing to answer all three questions—well, if he is incarcerated and he indicates that he would be willing to answer all three questions—

The Court: Excuse me. He is incarcerated right now. He spent this morning up in the Marshal's Office.

Mr. Bachman: Then the government would bring the grand jury in as soon as possible. For example, if he indicated today that he would answer the three questions, we would bring the grand jury in tomorrow.

The Court: Well, he has indicated he will answer Num-

ber 3 and he will answer Number 1 and Number 2 in part. You remember the part.

Mr. Bachman: Yes.

The Court: The part having to do with scholars but not [4] having to do with confidential sources. Are you able to state—I don't know whether you are or not—whether under such a posture the grand jury would come in tomorrow, or whenever? As soon as possible.

Mr. Bachman: Well, if he answered—if he only indicated that he would be willing to answer the questions in part, your Honor, the government would feel that he had not purged himself of his contempt. I believe the government's present intention—and I would have to discuss this not only in further detail with Mr. Gabriel but other persons—that it would not call in the grand jury unless he indicated that he was willing to purge himself of his contempt fully.

The Court: Well, thank you....

* * *

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* * *

[5] The Court: ... the Court will make its rulings and will state the reasons. Both motions are denied, of course, without prejudice to the witness, Mr. Popkin, filing another motion to vacate if it is accompanied by an unconditional undertaking to answer the questions contained in the order of the Court of Appeals dated October 13, 1972.

I will make it clear that there is no need for Mr. Popkin to testify in order to purge himself of contempt. That is not the way the statute reads. The statute provides for confinement until such time as the witness is willing to give such testimony. It is because of the language of the statute

that the order of the Court of Appeals stated that the contempt order would be affirmed unless Mr. Popkin stipulated in writing to answer the questions on demand, and it listed three questions, and if Mr. Popkin is prepared to file an unqualified statement now or five minutes or an hour from now, or whenever he wishes, he thereby purges himself of contempt and would be released.

However ,the statements filed thus far contain, in my opinion, qualifications which are inconsistent with the law as I understand it, principally the decision of the Court of [6] Appeals of this circuit in the Popkin case, and indirectly in the Supreme Court Branzburg case which we have been talking about.

The same is true with respect to the motion to suspend. The Court denies that motion. There is no reason for the allowance of a motion to suspend, as I see it. Within the past 24 hours, Mr. Popkin has submitted two stipulations, one incorporating the language of a memorandum by the Solicitor General's Office, and those qualifications were rejected by the Court of Appeals. The Court of Appeals indeed would not even accept for filing that qualified stipulation.

Now today, Mr. Popkin has stipulated, and I quote: "I will upon demand answer the three questions asked by the government and specified in the order of the Court of Appeals as those questions have been interpreted by the government." Well, if that last clause is omitted and there is an unconditional and unqualified expression of willingness in writing by Mr. Popkin that he will on demand answer the questions, well, then he will have thereby purged himself of contempt, and there is, Mr. Bachman, no need for a grand jury to be convened in tomorrow morning or at any great rush. All that is required of Mr. Popkin is a writing, not an appearance. It is a statement in writing of willingness.

Now I want to make just a couple of other points by way [7] of explaining my action. There might have been some possible confusion in my stating that I would accept government counsel's representations as to the government's intention here, and I consider that the government speaks only through Mr. Bachman and Mr. Gabriel. I had in mind times for convening the grand jury and its intentions generally when so stating. I did not mean that I discounted Solicitor General Griswold's brief because Mr. Bachman disagreed with it.

I did not and do not in any way feel bound by the government's interpretation of the Solicitor General's memorandum to the Supreme Court of the United States. On that I think it is a matter of argument. I do, however, agree with the interpretation proposed by Mr. Bachman. As I suggested repeatedly in my questions, I feel that in the Solicitor General's memorandum, he was talking not about the narrowness of the questions put by the grand jury or in the grand jury room, but rather the narrowness of the record in support of an appeal or certiorari to the Supreme Court of the United States.

Surely the questions are as broad as they could be. "Who are the persons you interviewed?" That is a very broad question. I believe that the memorandum of the Solicitor General makes the point that the record is too narrow to raise the question of the interrogatories put in the grand jury being narrower than they appear to be.

[8] The other point that I wish to state is that I gave consideration to a sort of middle ground here, namely, to suggest that Mr. Popkin might submit for in camera inspection, that is, the inspection of the Court only, the names of persons whom he considers to be confidential sources and the reasons why he feels that the confidentiality must be protected and should be thought to outweigh the public interest in the grand jury's investigation, but I have de-

cided that such a course would not be consistent with the Branzburg case.

I simply do not attach as much significance to Mr. Justice Powell's one-and-a-half-page concurring opinion in that case as does Mr. Klubock. Well, it is a two-and-a-half-page opinion. But in any event, it is a short concurring opinion.

Let's assume that Mr. Popkin undertook to make a showing now regarding the need for confidentiality of the sources whom he is reluctant to name. Even on the basis of such a showing, it is my understanding of the Branzburg case that that would still not be a proper defense to an application for contempt. I understand Branzburg to hold that, important though the First Amendment rights of newspaper reporters are—and I think no one would question that; certainly I don't question that—important though the rights under the First Amendment of academic researchers and professors and writers and authors and dramatists and others mentioned in the Supreme Court opinion are, when they come into conflict with the grand jury duty to run down fully [9] an investigation of a crime that has been specified as being investigated, those rights must yield. I think, therefore, that nothing is added, there is no productive purpose would be served, by my suggesting that the record be expanded at this juncture.

For those reasons, I will endorse those—I think the motion to suspend simply "Denied," because I think it doesn't accomplish much, or anything, but I think with respect to the motion to vacate, it is denied without prejudice, and certainly I hope and expect that counsel and Mr. Popkin will consider whether they feel that some further action is indicated in these premises.

That concludes the hearing in this case this afternoon, and we will recess.

(Thereupon the hearing was concluded.)

APPENDIX K

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §793, 64 Stat. 1003 provides:

§ 793. GATHERING, TRANSMITTING, OR LOSING DEFENSE INFORMATION

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the Presi-

dent has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photoghaphic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access

to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which

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is the object of such conspiracy. June 25, 1948, c. 645, 62 Stat. 736; Sept. 23, 1950, c. 1024, Title I, § 18, 64 Stat. 1003.

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18 U.S.C. §2314, 82 Stat. 885, provides:

§ 2314. TRANSPORTATION OF STOLEN GOODS, SECURITIES, MONEYS, FRAUDULENT STATE TAX STAMPS, OR ARTICLES USED IN COUNTERFEITING.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged,

altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

June 25, 1948, c. 645, 62 Stat. 806; May 24, 1949, c. 139, § 45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub.L. 87-371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub.L. 90-535, 82 Stat. 885.

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18 U.S.C. §2315, 75 Stat. 802, provides:

§ 2315. SALE OR RECEIPT OF STOLEN GOODS, SECURITIES, MONEYS, OR FRAUDULENT STATE TAX STAMPS.

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes or any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is

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a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

June 25, 1948, c. 645, 62 Stat. 806; Oct. 4, 1961, Pub.L. 87-371, § 3, 75 Stat. 202.

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18 U.S.C. §2514, 82 Stat. 216, provides:

§ 2514. IMMUNITY OF WITNESSES

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court, such witness shall not be excused from testifying or from producing books, papers or other evidence on the ground that the testimony or evidence required of him

may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

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18 U.S.C. §2516, 82 Stat. 216, provides in pertinent part:

"(a) any offense punishable by death or by imprisonment for more than one year ... under the following chapters of this title: chapter 37 (relating to espionage) .... ;

"...

"(c) any offense which is punishable under the following sections of this title: ... sections 2314 and 2315 (interstate transportation of stolen property);

"...

"(g) any conspiracy to commit any of the foregoing offenses."

---

28 U.S.C. §1826, 84 Stat. 932, provides in pertinent part:

§ 1826. RECALCITRANT WITNESSES

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily

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order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-974

SAMUEL L. POPKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINION BELOW

The opinion of the court of appeals of May 3, 1972, is published at 460 F. 2d 328 (Pet. App. A). Subsequent opinions and orders were entered May 17, 1972 (Pet. App. B); July 12, 1972 (Pet. App. C); October 13, 1972 (Pet. App. D); October 30, 1972 (Pet. E); November 7, 1972 (Pet. App. F); November 17, 1972 (Pet. App. H) and November 20, 1972 (Pet. App. I).

JURISDICTION

The judgments of the court of appeals were entered October 13 and November 20, 1972. The petition for a writ of certiorari was filed on January 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the issues raised in a petition for a writ of certiorari by a grand jury witness challenging an order

committing him for civil contempt are moot, where petitioner has been released from confinement, the grand jury has been discharged, and petitioner is no longer subject to any other collateral consequences arising out of his failure to testify.

2. Whether, assuming arguendo the case is not moot, the court of appeals properly affirmed a contempt order, where it found that the First Amendment claims asserted by petitioner were premature, and reserved decision on them pending a more complete record.

STATEMENT

Petitioner, an assistant professor of political science at Harvard University recognized as a research writer on the American involvement in the Vietnam war, was subpoenaed to appear before a federal grand jury in Boston on August 19, 1971.[1] His motions to quash and to compel disclosure of possible electronic surveillance were denied, but his testimony was not actually sought at that time. A second subpoena was served, compelling his reappearance on October 13. Called on October 14, he refused to testify and was directed to reappear on October 27. On that date he appeared but moved for a protective order to prevent further questions delving into "information obtained by him in his capacity as a scholar, author and teacher," and moved further for a transcript of his testimony and disclosure of alleged electronic surveillance.

---

[1] The grand jury, convened on July 12, 1971, is the same one involved in *Gravel* v. *United States*, 408 U.S. 606, 608: "The crimes being investigated included the retention of public property or records with intent to convert (18 U.S.C. §641), the gathering and transmitting of national defense information (18 U.S.C. §793), the concealment and removal of public records or documents (18 U.S.C. §2071) and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. §371)."

His motion for a protective order was accompanied by the affidavits of some 24 colleagues in the academic field. All three motions were denied on October 28, after which applicant was granted transactional immunity upon application of the United States Attorney, 18 U.S.C. 2514, and ordered to testify. Excused once again, he was not asked to return until January 18, 1972. Following his refusal to answer three questions, a contempt order was sought and granted on March 21. Petitioner responded to the questions on March 27, purging himself of contempt and answered several further questions but again refused to answer several more, relying on his asserted First Amendment "scholar's privilege."

The district court ordered petitioner committed for refusal to answer nine questions. The court of appeals affirmed in part and reversed in part. Judges Aldrich and McEntee were of the view that six of the nine questions were "badly phrased" (Pet. App. A 39) and hence that petitioner could not be held in contempt for his failure to respond. While Judge Coffin, writing for the court of appeals, would have placed the decision on broader grounds, he joined in the holding on the "narrower formal" ground (Pet. App. A 35).

The court of appeals, however, held that petitioner would have to answer the following three questions (Pet. App. D 44):

> [1] Who are the persons you interviewed in order to acquire this knowledge of who participated in the Pentagon Papers study?
>
> [2] Who are those persons to whom you are referring with regard to conversations in the District of Massachusetts which led you to the knowledge of who the participants were in the Pentagon Papers study?

> [3] Did Daniel Ellsberg ever discuss with you the content or existence of the Pentagon Papers between January 1, 1971, and June 13, 1971?

In so holding, the court of appeals found that the question petitioner urges in this Court—the existence of a "scholar's privilege" under the First Amendment—was not presented by this record. The court explained that, while "the question posed to us" is whether the relationship between a scholar and his sources "gives the scholar a constitutionally based privilege not to testify which others do not possess," the "substantiated rationale of appellant and the questions put by the grand jury do not, in our opinion, quite meet head on" (Pet. App. A 32).

The basic rationale of the privilege asserted by petitioner, the court of appeals found, "bears on the right of the scholar not to disclose the identities of his 'contacts and sources'" (Pet. App. A 32). But this "underlying rationale falls short of immunizing a scholar from testifying about conversations with those who are not his sources" (Pet. App. A 34). The court of appeals therefore concluded that (Pet. App. A 33-34):

> * * * the two questions seeking the names of persons interviewed who gave him knowledge of participants in the Pentagon Papers study should be answered, at least to the extent that the persons were not government officials or other participant-sources. One of the questions, relating to persons in Massachusetts, seems not to be directed either to foreign affairs, intelligence, or defense officials in government or to any person, in or out of the government, in Vietnam. *Were it to become clear that a question delved into confidential relationships with such persons, we are not sure that the grand jury would see fit to pursue its inquiry. If it did, however, we would*

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at least have a factual setting enabling us to address the issue less theoretically.

This analysis also disposes of the question asking whether Ellsberg discussed with appellant the content or existence of the Pentagon Papers between January 1 and June 13, 1971. There is no representation that Ellsberg during that period was a government official, or otherwise a sensitive source, or even that Popkin had established a confidential relationship as to these matters with Ellsberg when the latter was a public official [emphasis added].

Accordingly, after delaying its order to resolve other issues in the case, the court of appeals on October 13, 1972, held that the contempt order, with respect to the three questions discussed above, would be affirmed unless within 21 days appellants stipulated in writing to answer them on demand (Pet. App. D 44-45).

The stipulation filed by petitioner in response to this order stated (Pet. App. G 48):

> The United States has interpreted the questions specified in this Court's Order of October 13, 1972, as asking only for the "disclosure of personal contact with fellow scholars concerning the mechanics of the production and dissemination of the 'Pentagon Papers' study" (Memorandum p. 4), and that "here, the witness is questioned not about his sources but merely about conversations with other scholars." (Memorandum p. 3) In light of those representations, I hereby stipulate that upon demand I will answer those questions. My refusals have always been directed toward questions requiring disclosure of confidential sources of a sensitive nature, not those relating merely to other scholars.

The "interpretation" to which petitioner referred was contained in our opposition to his earlier application to this Court for a stay of the contempt order pending a petition for certiorari. (The stay was denied.) There we interpreted the court of appeals' decision—set forth above—as "a ruling" that the questions which the petitioner was required to answer did not necessarily require disclosure of confidential sources; "they merely request disclosure of personal contact with fellow scholars concerning the mechanics of the production and dissemination of the 'Pentagon Papers' study" (Memorandum 4).

The court of appeals declined to accept petitioner's conditional stipulation (Pet. App. H 49).[2] After additional proceedings in the district court, in which petitioner agreed to answer the third question unconditionally (Pet. App. J 53), but would not stipulate to answer the other two questions if called before the grand jury, he was incarcerated for contempt on November 21, 1972.

ARGUMENT

1. We bring to the attention of the Court the following facts which show that the issue raised by the petitioner is moot.

On November 28, 1972, seven days after petitioner's incarceration, the grand jury was discharged. The statute providing for incarceration for civil contempt permits

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[2] By so doing it did not, as petitioner claims, "change its original Opinion of May 3, 1972" (Pet. 6-7). There is nothing inconsistent with the court of appeals' rejection of petitioner's conditional stipulation and its statement that if it became "clear that a question delved into a confidential relationship * * * we are not sure that the grand jury would see fit to pursue its inquiry. If it did, however, we would at least have a factual setting enabling us to address the issue less theoretically" (Pet. App. A 34).

the witness's confinement until he testifies or until the grand jury expires. See 28 U.S.C. 1826. A grand jury subpoena, moreover, has no life beyond that of the grand jury whose investigation gave rise to its issuance. There is no lawful basis upon which the United States can now recommit petitioner for past or present refusal to answer grand jury questions. The case is, therefore, moot.

Petitioner's response to the issue of mootness is "to point out two matters" (Pet. 7, n. 5): (1) that the grand jury in *United States* v. *Caldwell,* 408 U.S. 665, had expired, after oral argument, but prior to the decision in the case; and (2) that here the "government explicitly stated that it was asking for a discharge of the grand jury because it did not intend to present further evidence until after the case of *United States* v. *Ellsberg* had been completed, and implied that at that time petitioner might be recalled."

These "two matters," however, do not provide a sufficient answer to the plain fact that a "case" or "controversy" no longer exists between petitioner and the United States.

The facts in *United States* v. *Caldwell, supra,* are not the same as those here. Putting to one side the absence of any discussion of the mootness issue in the opinion of the Court,[3] it was apparent that, since the United States sought review from the adverse decision, it fully intended to call Caldwell before a new grand jury, as it had in fact done when the first grand jury had expired during the course of the proceedings (408 U.S. at 678-679). Here, on the other hand, a newly empanelled grand jury may not begin a follow-up investigation for some time,

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[3]The mootness issue in *Caldwell* was itself in a sense mooted by the fact that the other two cases decided therewith involved the same basic First Amendment claim as *Caldwell* (408 U.S. 679-680).

if ever. While we cannot state absolutely that no grand jury in the future will want to hear testimony from petitioner along the lines of the testimony he has previously refused to give in these proceedings, the government has no present intention of calling him, and it is possible that, in the intervening period, the information sought from petitioner will be obtained from other sources. In sum, it is at best speculative whether petitioner will ever be called before a related grand jury and even more speculative that, if recalled, he will be asked the same questions. Accordingly the case is moot. See *Local No. 86, Oil, Chemical and Atomic Workers International Union, AFL-CIO* v. *Missouri*, 361 U.S. 363, 368-369; *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360; *Golden* v. *Zwickler*, 394 U.S. 103, 109. Cf. *Shillitani* v. *United States*, 384 U. S. 364, 372; *Parker* v. *United States*, 397 U.S. 96.

~~364, 372; *Parker* v. *United States*, 397 U.S. 96.~~

Moreover, even if it were likely that petitioner would be recalled and asked the same questions, this is not a case where the challenged action is one "capable of repetition, yet evading review" (*Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515; *Roe* v. *Wade*, No. 70-18, decided January 22, 1973, slip op., p. 10). The civil contempt statute involved here, 28 U.S.C. 1826(a), not only provides for bail pending a non-frivolous appeal of contempt order[4] but also contains a provision requiring a decision by the court of appeals within thirty days from filing of the notice of appeal. There is thus no substantial likelihood that petitioner will be unable to obtain full review of any meritorious

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[4]Compare, *In re Bart*, 82 S. Ct. 675, where Chief Justice Warren, in chambers, granted a stay of commitment because of "the likelihood that the normal course of appellate review might otherwise cause the case to become moot * * *" (82 S. Ct. at 676).

claim if he should ever again be called before another grand jury.

2. Petitioner's claims on the merits require only brief discussion.

a. There is no conflict between the opinion below and the holding of the Court of Appeals for the Ninth Circuit in *Bursey* v. *United States*, 466 F. 2d 1059, which petitioner cites for the proposition that the grand jury was required " 'to establish that there was a "substantial connection" between the information sought and the criminal conduct which the Government was investigating before the witnesses could be held in contempt for refusing to answer questions that cut deeply into First Amendment rights'" (Pet. 11).

The issue in *Bursey* did not involve any claim regarding "a scholar's privilege" or "newspaperman's privilege" to protect sources.[5] The case involved inquiries to newspaper editors requesting information as to who was responsible for the editorial conduct and distribution of a newspaper. These inquiries, the court of appeals found, "cut deeply into press freedom" and the "right of associational privacy" (466 F. 2d at 1084-1085).

The instant case involves an asserted First Amendment right of a scholar to protect his sources, a right that has never been recognized, and is indeed at odds with *Branzburg* v. *Hayes*, 408 U.S. 665. Moreover, since the Ninth Circuit's holding was expressly limited to inquiries which "cut deeply into First Amendment rights" (466 F. 2d at 1091), and since the court of appeals here found that petitioner's First Amendment claim was presented in

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[5]The court of appeals there observed (466 F. 2d at 1090): "News gathering is not involved in our case."

a "theoretical" context (Pet. App. A 34), and reserved decision on it, there is no direct conflict between the holding below and the Ninth Circuit's opinion in *Bursey*.

b. Contrary to petitioner's second ground for granting the writ, it is thus clear that the court of appeals has not "decided important questions of federal law which have not been but should be settled by this Court" (Pet. 12). Moreover, there is no support in *Branzburg* v. *Hayes*, *supra*, for the proposition, asserted here, that "the First Circuit should have applied a balancing test to determine whether the witness' First Amendment claims should be upheld" (Pet. 13-14).[6] This approach, which is based on the dissenting opinion in *Branzburg* (408 U.S. at 739-740), was in fact rejected by the Court (408 U.S. at 701-706).

Finally, petitioner's claim that "a witness before a grand jury, who has been granted limited transactional immunity, is entitled to be advised of the pertinence of questions asked" so that he may "make a sound judgment as to whether the question falls within the grand jury's power" (Pet. 20-21), was never asserted in the courts below, and has nothing to do with any First Amendment issue. The cases cited by petitioner stand for the proposition that "the [grand jury] witness may challenge whether the subject matter of a grand jury investigation is consonant with the statutory authorization for the grant of immunity and that, upon such a challenge, the Government must make at least a modest showing that it is."

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[6]Petitioner's "balancing" argument obviously goes well beyond the claim, answered in the opinion of the court of appeals (Pet. App. A 28-29), that the grand jury must make a preliminary showing that its questions were relevant to the inquiry it was conducting (see Pet. 18-20).

In re Vericker, 446 F. 2d 244, 247 (C.A. 2), followed in *Bursey* v. *United States, supra*, 466 F. 2d at 1091.

Petitioner here did not dispute the relevence of the grand jury's inquiries to the grant of transactional immunity he had received. Hence, the claim is not available to him here (*Lawn* v. *United States*, 355 U.S. 339, 362, n. 16).[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.
A. WILLIAM OLSON,
Assistant Attorney General.
ROBERT L. KEUCH,
WILLIAM M. PIATT,
Attorneys.

MARCH 1973.

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[7] Moreover, this issue is of no continuing significance, and will not arise under the new use immunity statute (18 U.S.C. 6001, *et seq.*) sustained in *Kastigar* v. *United States*, 406 U.S. 441. Unlike the transactional immunity statute (18 U.S.C. 2514), pursuant to which petitioner was immunized, the use statute provides that testimony compelled under the statute may not be used against a witness in any criminal case, and more significantly, contains no limitation regarding the subject matter of investigation in which the immunity may be accorded. Hence no challenge can be made that the subject matter of the grand jury investigation is not consonant with the statutory authorization. The transactional immunity statute, 18 U.S.C. 2514, has been repealed, effective December 14, 1974.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-974

SAMUEL L. POPKIN

v.

UNITED STATES

ON APPEAL FROM AN ORDER OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[redacted]

BRIEF OF AMERICAN ANTHROPOLOGICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, and AMERICAN SOCIOLOGICAL ASSOCIATION, AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-974

SAMUEL L. POPKIN

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

American Anthropological Association, the American Political Science Association and the American Sociological Association hereby respectfully move for leave to file the attached brief amicus curiae. The consent of the attorneys for the petitioner and respondent has been obtained and is filed herewith.

The interests of the American Anthropological Association, the American Political Science Association and the American Sociological Association in this case are more fully set forth in the brief.

Amicus curiae have been unable to file this brief previously because their governing bodies have been unable to meet to grant the specific authorization.

WHEREFORE, the premises considered, the American Anthropological Association, the American Political Science Association, and the American Sociological Association, respectfully request leave to file the brief attached hereto as amicus curiae in support of the Petition for Writ of Certiorari.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-974

SAMUEL L. POPKIN

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF AMERICAN ANTHROPOLOGICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, AMERICAN SOCIOLOGICAL ASSOCIATION, AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

I.

INTERESTS OF AMICI

The following learned societies join together in support of a petition for a writ of certiorari to the U.S. Court of Appeals for the First Circuit.

1. The American Anthropological Association was founded in 1902 to advance the science of anthropology in all its branches, to encourage anthropological research and to promote the wide recognition and constant improvement of professional standards in anthropology. The Association now has over 8500 individual members.

At its 71st Annual Meeting in November 1972, the Council of the AAA passed a motion empowering the Association to intervene as a friend of the Court in Petitioner Popkin's behalf. The motion stated in pertinent part: "His case lays bare the fundamental issue before us: the responsibility of the scholar to protect his subjects and to ensure the anonymity of his sources, a responsibility that is essential to the right to conduct freely scholarly research for the purpose of disseminating knowledge to the public."

2. The American Political Science Association, founded in 1903, has as its central purpose the encouragement of the study of political science, including political theory, political institutions, politics, public law, public administration and international relations. It now has over 13,500 individual members.

The Council of the Association at its December 18, 1973, meeting expressed its concern in the matter of Samuel Popkin and related issues and in this connection, the Association is authorized to join in this brief.

3. The American Sociological Association, founded in 1905, is a nationwide organization that seeks to stimulate and improve research, instruction, and discussion and to encourage cooperative relations among persons engaged in the scientific study of society. The Association now has over 15,000 individual members.

The Council of the Association meeting on December 2, 1972, expressed its concern in the matter of Samuel

Popkin and related issues. The members of the Council were deeply disturbed by the inhibiting effect on basic research in the social sciences that the imprisonment of such a scholar as Samuel Popkin might have.

II.

WORK OF SCHOLARS

The effect of Samuel Popkin's appearance before a grand jury and resultant action against him has implications affecting the work of scholars engaged in research.

Scholars contribute information essential to the society and to the policy-making function of the government. For example, scholars have conducted research sponsored by a variety of government and private agencies in areas such as crime, civil disorder, pornography, health care, violence, immigration, population control, conduct and administration of elections, and the use of drugs. In many cases, researchers have uncovered information vital to the understanding of these problems which would not have been obtained had their sources not believed that the researchers could safely assure them of confidentiality. Such information is clearly necessary for the public interest in general and for the informed formation of national policy in particular.

The American Anthropological Association's Principles of Professional Responsibility provide that sources have a right to remain anonymous and that anthropologists should do everything within their powers to protect the privacy of the people being studied. Sociologists and political scientists are equally concerned that their sources be protected.

III.

IMPORTANCE OF PROMPT DECISION

In the past scholars believed they were able to assure sources of anonymity because the release of any information gained was deemed to be solely within the scholar's discretion. Recently, however, with increasing number, prosecutors, congressional committees and grand juries have become interested in the sources of scholarly research. As in the instant case these bodies have asserted the right to inquire completely into a scholar's sources of information. Notes have been subpoenaed and scholars questioned as to their research. As a result, scholars carrying out their research are no longer secure in the belief that research material provided them in confidence will be free from pressure of court ordered disclosure at a future point and as such are impaired in the collection of research data.

The problem has been aggravated by the widespread publicity given to the instant case. Until limits of public inquiry are authoritatively settled by this Court, scholars cannot be certain of what protection, if any, they can assure their sources, and sources cannot predict the possible repercussions of cooperation in furnishing information. The resulting uncertainty impinges upon normal scholarly inquiry and inhibits research into many social and behavioral problems most in need of immediate research and enlightenment.

IV.

IMPORTANCE OF GUIDELINES IN BALANCING INTERESTS

The public interest in uninhibited original scientific research, whether in the social or other sciences, is as important as any other public interest. Freedom of scientific discussion and the free flow of information are ultimately dependent on unrestrained original research. Such research constitutes a significant part of a society's eyes and ears.

Amici support the position that before requiring a scholar to testify or furnish documents, a court should balance the interest of the inquiring agency against the First Amendment rights of the scholar. This issue is fairly posed in the instant case. Guidelines from the Court are needed to determine the balance between the scholars' free speech rights and grand juries' rights.

The Petition for Certiorari should be granted.

Respectfully submitted,

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